



**Challenge
to the
Listing and Designation of the
USDC Seafood Inspection Program
As a Commercial Activity**

ABSTRACT: The USDC Seafood Inspection Program is a fully reimbursable program that inspects/certifies approximately 17% of the fishery products consumed in the United States, while also providing inspection and certification of more than 142 million pounds of U.S. exports to meet the requirements of foreign governments and buyers. Sanitation and hygienic practices are evaluated, along with product inspection in approximately 240 processing plants located throughout the U.S., American Samoa, and Puerto Rico. In addition, product lot inspections are conducted for approximately 2500 firms annually. This Challenge demonstrates that the Program: 1) is exempted from consideration under the FAIR Act because it is a “Nonappropriated funds instrumentality” in that it does not use any appropriated funds; and 2) performs inherently governmental functions to the benefit of industry and consumers. In addition, statutory, economic, and logistical considerations further reinforce that the USDC Seafood Inspection Program was inappropriately identified for inclusion under the FAIR Act, and that no benefits would be afforded to the U.S. taxpayer while significant disruption and additional costs could be experienced by affected industry members.

CHALLENGE

The following Challenge is being submitted under the provisions of Section 3 (Challenges to the List) of the Federal Activities Inventory Reform Act of 1998 (subsequently referred to as the FAIR Act). The FAIR Act states, in part,:

Sec. 3. CHALLENGES TO THE LIST

- (a) Challenge Authorized.—An interested party may submit to an executive agency a challenge of an omission of a particular activity from, or an inclusion of a particular activity on, a list for which public availability has been published under section 2.
- (b) Interested Party Defined.—For the purposes of this section, the term “interested party”, with respect to an activity referred to in subsection (a), means the following:
 - (1)....
 - (2)....
 - (3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.

I, Richard V. Cano, have been continuously employed since December 1980 by the Seafood Inspection Program (and its predecessor organizational titles) located in the National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA) of the U.S. Department of Commerce (USDC). I am the Deputy Director, currently functioning as the Acting Director, of the Seafood Inspection Program. In this capacity, I am filing this Challenge to the agency’s decision to list and designate the USDC Seafood Inspection Program (Program) as a commercial activity for the following reasons:

Exception under the FAIR Act

Section 4 of the FAIR Act addresses applicability of the Act and identifies the agencies that are covered under the Act, as well as exceptions to which the Act does not apply.

Sec. 4. APPLICABILITY

(b) Exceptions.—This Act does not apply to or with respect to the following:

(1)....

(2)....

(3).Nonappropriated funds instrumentality....

The reason for such an exception is evident in that a purpose of the FAIR Act is to identify activities in the federal government that are not inherently governmental functions (i.e., commercial activities) and that such commercial activities may be considered for contracting out to the private sector. The ultimate purpose for contracting out such activities is to reduce the costs of Government to the benefit of U.S. taxpayers. Therefore, it is logical that programs that do not receive appropriated funds (i.e., tax dollars) should be excluded from the scope of the FAIR Act and subsequent processes.

NOAA provides a succinct description of the FAIR Act and the subsequent A-76 process under its website entitled “A-76 Studies, Frequently Asked Questions”

(<http://www.ofa.noaa.gov/~audit/noaa/A-76faq.htm>), which includes the following statements:

...The Federal Activities Inventory Reform (FAIR) Act of 1998 requires federal agencies to submit to the Office of Management and Budget (OMB) an annual list of activities performed by government employees that, in the judgement of the agency head, are not inherently governmental functions. OMB requires agencies to conduct A-76 competitions on a percentage (*sic*) of their commercial functions each year.

...The goal of the A-76 process is to improve efficiency and reduce costs to the taxpayer. (emphasis added)

The USDC Seafood Inspection Program is authorized under the Agricultural Marketing Act of 1946 (7 USC 1621-1627) which, among other things, established that the programs be voluntary and able to collect fees to cover costs:

§ 1622 (h) ... under such rules and regulations as the Secretary of Agriculture may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use the service authorized by this subsection.

Under § 1626, “agricultural products” is defined to include “fish and shellfish, and any products thereof, including processed and manufactured products...”. The inspection of fish and shellfish and the products thereof was transferred to the U.S. Department of Commerce in 1970 (16 U.S.C. 742(e) and Reorganization Plan 4 (23 F.R. 2304, 35 F.R. 15627), 1970).

The USDC Seafood Inspection Program is fully funded through the fees that are assessed and collected from the industry members that participate in the Program. No appropriated funds are used to support this Program. In addition, the Program actually contributes approximately \$1.6 million annually to NMFS and NOAA in overhead costs, thus reducing these agencies' appropriated funds needs.

Therefore, under Sec. 4. (b)(3) of the FAIR Act, as a "Nonappropriated funds instrumentality", the Program is excepted and does not fall under the scope of the Act. This position is supported by the legal opinion (see Attachment A) of the senior attorney in the Office of General Counsel for NOAA Fisheries. This attorney has previous experience with the General Accounting Office (GAO) and is the primary legal resource for the Program. He is intimately familiar with the responsibilities and functions of the Program, as well as the responsibilities and functions of other food inspection programs of the Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA).

Inherently Governmental Functions

In addition to the USDC Seafood Inspection Program being excepted from consideration under Sec. 4. (b)(3) of the FAIR Act, as a "Nonappropriated funds instrumentality", it is further inappropriate to identify the Program for consideration for contracting with a private source because the Program's activities are inherently governmental functions.

The FAIR Act ([Page 112 STAT. 2382], Public Law 105-270, 105th Congress) is:

An Act

To provide a process for identifying the functions of the Federal Government that are not inherently governmental functions,...

Section 5 of the FAIR Act provides definition and criteria for determining "inherently governmental function". The following extracts of this Section are germane to the functions of the USDC Seafood Inspection Program:

(2) Inherently governmental function.—

(A) Definition.--The term "inherently governmental function" means a function that is so intimately related to the public interest as to require performance by Federal Government employees.

(B) Functions included.--The term includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other

things, the interpretation and execution of the laws of the United States so as—

(i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(iii) to significantly affect the life, liberty, or property of private persons;

(iv) to commission, appoint, direct, or control officers or employees of the United States; or

The USDC Seafood Inspection Program routinely evaluates the safety, wholesomeness, proper labeling, and quality of fish and fishery products, as well as determining the adequacy of sanitation and hygienic practices of the processing facility and the safety of the processes used in the manufacture of the food. These functions are equivalent to the functions performed by the inspection personnel of USDA and FDA toward ensuring that the consumer is provided with safe, wholesome, properly labeled food of acceptable quality. It should be noted that both USDA and FDA have determined these functions to be inherently governmental. The USDA has also determined that the inspectors at the USDA Animal and Plant Health Inspection Service (APHIS) are inherently governmental.

In order to perform the duties assigned, USDC Inspection staff must possess the knowledge and experience necessary to evaluate the public health risks associated with the raw material, ingredients, manufacturing process, and finished product of the numerous fishery products that are produced and distributed in the United States, and/or imported or exported by the United States. In addition to the public health issues, USDC inspectors must understand and interpret the appropriate food laws and regulations of the United States to make judgements regarding the wholesomeness of the product and whether this may be adversely impacted by the sanitation and hygienic practices of the processing facility and/or the process employed in the manufacture of the food. Further, assessments must be made of the labeling that is associated with process, ingredients, and finished product to determine compliance with Federal food labeling laws and regulations. In the case of products which will be evaluated for compliance with quality specifications or U.S. Standards for Grades, the inspector must also determine if the product conforms to the established criteria before granting the use of an Official Mark (e.g., U.S. Grade A, Processed Under Federal Inspection, USDC Lot Inspected, USDC Accepted Per Specifications). These actions require the inspector, who is routinely acting alone, to exercise appropriate discretion in making decisions for the Federal Government regarding the significance of the issue or adverse finding in order that the firm is held to the proper level of control, the cost associated with the manufacture of the product is neither unnecessarily elevated

nor reduced, and that the buyer/consumer is assured that the product is safe, wholesome, properly labeled, and of the indicated quality.

In addition to conducting these functions throughout the United States, the USDC Seafood Inspection Program performs evaluations of the sanitation and hygienic practices of foreign manufacturing facilities and the control systems that they utilize at the request of U.S. importers or the foreign firms to demonstrate that they are in compliance with U.S. requirements (e.g., FDA HACCP regulation 21 CFR Part 123).

The commonality in activities and the qualifications of USDC inspection personnel and those of the FDA is further reinforced through determination by the Office of Personnel Management (OPM) that USDC inspection personnel would use the same employment series as FDA inspection personnel; namely, Consumer Safety Officers and Consumer Safety Inspectors.

The USDC Seafood Inspection Program also provides inspection and certification support to USDA food programs that utilize fishery products (i.e., School Lunch Program; surplus commodity buys). USDC inspection and certification under these programs attest that the product has been formulated to provide the required nutritional composition for use in schools and/or meets USDA procurement requirements including safety, wholesomeness, quality, labeling, and packaging.

USDA and USDC provide the Department of Defense (DOD) with a Food Product Evaluation Team composed of product specialists from the two civilian agencies to evaluate samples from products that have been purchased by DOD under its Prime Vendor Program. These products are destined for military troop feeding and are evaluated for compliance with DOD contract requirements that include origin, product identity, wholesomeness, quality attributes, labeling, and packaging. DOD may use the results of these audits to determine the acceptability of the specific shipment that was sampled by DOD and the results of combined audits to determine whether a continued relationship with the Prime Vendor is warranted.

Additional inherently governmental functions performed by the USDC Seafood Inspection Program are illustrated in the following areas:

Memorandum of Understanding between FDA and USDC

A Memorandum of Understanding (MOU) has existed between the FDA and USDC since January 17, 1975 “Relative to Inspection Programs for Fishery Products”. The following excerpts from this MOU demonstrate the common goals of the FDA and the USDC Seafood Inspection Program, as well as the interaction of the agencies, in order to better assure the safety, wholesomeness, and proper labeling of fishery products for the benefit of the public:

...The agreement, which sets forth the working arrangements being followed or adopted in the interest of the public so that each agency will discharge as effectively as possible its inspection and standardization activities for fish and fishery products,...

...Department of Commerce, under authorities established by the Agriculture Marketing Act and the Fish and Wildlife Act is responsible for (1) the development and advancement of commercial grade standards for fishery products and better health and sanitation standards in the industry and (2) furnishing inspection, analytical, and grading services and issuing certificates to producers, processors, shippers, receivers, or interested parties. Its major purpose is to encourage and assist the industry in improving the quality and safety of its products, and to provide objective information by means of inspection and official certification...

A. The National Marine Fisheries Service will:

1.-4. ...

5. Decline to inspect, grade, certify, or permit the use of official grade marks or other approved identification, except Retained Tags, on a food product which is considered adulterated or misbranded under the Federal Food, Drug, and Cosmetic Act of such type and/or in such amounts as to result in the food product being subject to regulatory action by FDA. NMFS will make such examinations and tests as are reasonably feasible for those materials and substances that would be likely to contaminate the product.

6. Report to the appropriate FDA field office information concerning any product that has been placed under official retention by NMFS because it is suspected, or known to be adulterated, or misbranded under the Federal Food, Drug, and Cosmetic Act, of such type and/or in such amounts so as to result in the food product being subject to regulatory action by FDA, unless such food product is so reconditioned as to comply with FDA requirements or is segregated and disposed of for non-food use or otherwise lawfully shipped or sold.

7. Decline to inspect or grade samples of product which are the subject of seizure, prosecution, injunction, or import detention action. This does not preclude reinspection of samples legally collected for that purpose by NMFS, if the FDA seizures or other actions involve products which have previously been inspected or graded by NMFS.

8. Participate in a cooperative effort in investigations of food poisoning, product recalls, and problems concerning food contamination caused by disasters or other phenomena involving foods where both agencies have mutual obligations.

9.-10. ...

B. The Food and Drug Administration will:

1. Recognize that the NMFS service provided in connection with the voluntary contract inspection of fishery processing establishments contributes to protection of consumers and aids FDA in enforcement of pertinent statutes. ... The NMFS inspection service will not diminish FDA's authority to inspect but should minimize FDA inspections in establishments under NMFS contract inspection. In this regard, NMFS inspectors shall routinely notify contract establishments of pertinent FDA requirements, advise them on how to comply and verify compliance. NMFS inspectors may not act as FDA inspectors but their inspections and consultations with FDA should reduce the necessity for FDA inspections.

2.-7. ...

8. Invite the NMFS inspector assigned to a processing plant which is operating under NMFS contract inspection to participate with the FDA inspector during his inspection of

such plant. The FDA and NMFS inspectors shall discuss any conditions noted which may result in violations of law.

C. It is mutually agreed that:

1. Where either agency believes that a particular violation is occurring in several fish processing plants in the industry, it may request a meeting with the other agency to consider steps to investigate the situation immediately and, where necessary, to take mutually agreeable action, ...

2. Both agencies will participate in periodic joint meetings, and with industry as appropriate, to promote better communication and understanding of regulations, policy, and statutory responsibilities, to improve sanitation and food-handling practices in processing establishments, and to serve as a clearinghouse for questions and problems as may arise.

3. ...

4. Both agencies will exchange data and cooperate in the development of sampling plans methodology, and guidelines for determining unavoidable natural and environmental defects common to fish and fishery products.

5. ...

6. Formal training courses sponsored by either agency will be available whenever possible for the other's personnel.

7.-11. ...

The activities outlined in these excerpted segments of the MOU clearly demonstrate the inherently governmental functions that are conducted by the USDC Seafood Inspection Program for the benefit of the industry and consumers. Interaction between the FDA and USDC has expanded since the implementation of this MOU in 1975 and the spirit of the MOU has resulted in a number of activities (e.g., the development of HACCP procedures, and EU certification) that have strengthened the rapport between the agencies. Both agencies recognize that the current MOU should be revised to better reflect the expanded activities of the respective agencies, as well as to further delineate additional areas where recognition and cooperation can further enhance the benefits afforded to the public.

A Critical Function under the NOAA Continuity of Operations Plan

Under Presidential Decision Directive 67 (Ensuring Constitutional Government and Continuity of Government Operations) requires all Federal departments and agencies to have a viable continuity of operations capability. The Continuity of Operations Plan (COOP) for NOAA "ensures the continuance and uninterrupted delivery of critical services to the public, other Federal agencies, clients, and NOAA personnel which are necessary to enable us to comply with existing statutes, executive orders, and mandates...".

NMFS and NOAA have identified the Seafood Inspection Program to be a "critical function that must be re-established within the first 12 hours" after an incident (e.g., national emergency). Critical functions are defined as:

...functions or operations, that are required to be performed by statute or Executive Order to provide vital services, exercise civil authority, maintain the safety and well being of the general populace, and/or sustain the nation's industrial and economic base in an emergency, or other functions deemed essential by the heads of principal organizational elements.

It is reasonable to conclude that the nature of such functions must be considered to be inherently governmental.

Therefore, it is inconceivable how NMFS/NOAA can in one sense consider the USDC Seafood Inspection Program to be a "critical function", while simultaneously under the FAIR Act conclude that it is not inherently governmental, but rather commercial, and thereby should be contracted out to the private sector.

Member of the Interagency Food Working Group

The USDC is among the Federal agencies that compose the food regulatory framework in the United States. The primary reason for its inclusion is the presence of the Seafood Inspection Program. The events of September 11, 2001 demonstrated that the United States is vulnerable domestically to terrorist attacks. Until this event the Federal agencies involved in food were primarily focused on food safety due to processing or distribution failures. Now, the Federal agencies must expand their consideration from traditional food safety issues to food defense and the possibilities of significant intentional contamination threats.

Vulnerability assessments have resulted in the Administration's determination to ensure that appropriate actions are taken to protect the Nation's food supply. As part of this effort, the Interagency Food Working Group was formed. Its Charter contains the following statements:

The Homeland Security Council (HSC) will assemble an interagency food working group (IFWG) to develop an interagency effort to protect the food supply and minimize it as a target. The length of the IFWG is dependent upon its findings while preparing the strategic plan.

Under National Security Presidential Directive (NSPD) 17, the federal government is directed to pursue a new strategy to counter the threats from weapons of mass destruction. As one part of this strategy, NSPD 17 called for improved interagency coordination. The October 8, 2001 Executive Order establishing the Office of Homeland Security directed the office to coordinate efforts among federal, state, and local entities and the private sector for preventing, preparing for, and responding to terrorist attacks on the United States. Public Law 107-296, establishing the Department of Homeland Security, also established the Homeland Security Council within the Executive Office of the President with one role being to ensure coordinated homeland security efforts. In conjunction with these materials, in February 2003, the HSC will release its *National Strategy for the Physical Protection of Critical Infrastructures and Key Assets*. In

conjunction with the authorities listed above, this working group will prepare a strategic plan for protecting the food sector.

Among the areas to be addressed is:

Preparedness and Response Preparedness will require the federal agencies to establish interagency procedures and processes for responding to incidents. This infrastructure will facilitate response efforts should the food supply experience a terrorist attack.

It would be logical and reasonable to believe that these activities and functions that the USDC Seafood Inspection Program will participate in are inherently governmental functions.

Statutory, Economic, and Logistical Considerations

Although the reasons presented under the sections “Exception under the FAIR Act” and “Inherently Governmental Functions” provide clear evidence and rationale that it is inappropriate to conclude that the USDC Seafood Inspection Program should be listed as a commercial activity, other issues such as statutory, economic and logistical considerations further reinforce that it is improper, counterproductive, and contrary to logic to subject the Program to A-76 procedures.

Statutory Consideration

As explained in the attached legal opinion, USDC relies on the enabling legislation of the Agricultural Marketing Act of 1946 to provide for inspection and certification activities. At the time of passage of the Act, these activities were centered in USDA. Subsequently, through various statutes, the authorities for providing voluntary inspection and certification functions for fish and fishery products were transferred to USDC. However, USDA continues to utilize these authorities for other commodities and has taken the position that its food safety and inspection programs are inherently governmental functions, and as such, are not suitable for FAIR Act consideration. The Program’s legal counsel advises that “To avoid potential inconsistency in interpreting our shared statutory authority, I believe any decision to list DOC’s inspection program under the FAIR Act inventory should only be made with the prior concurrence of the Secretary of Agriculture.”

As previously noted in the “Exception under the FAIR Act” section of this paper, the Agricultural Marketing Act provides for the “... assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered...”. It would be unreasonable and therefore contrary to the provisions of the Act to have participants of the USDC Seafood Inspection Program bear any additional costs associated with an A-76 study.

The Agricultural Marketing Act requires the Federal government to set fees that are, by its own definition, “reasonable” and “cover the costs.” This language is designed to apply to a reimbursable program with a National (inherently governmental) mandate, and is not compatible with outsourcing. Whatever the outcome of the A-76 source selection, the Federal government must continue to set fees that are both nondiscriminatory and in the public interest; however, a

contractor would want to maximize revenues by charging what the traffic will bear. A contractor would also not have any incentive to cut costs for any service it provides if the government will then reduce the fees it can charge to comply with the Agricultural Marketing Act. A contractor would be unlikely to even submit a bid unless guaranteed a desired profit in a cost-plus contract for each type of service. This would make any A-76 cost comparison biased, unreliable, and inconsistent with the Agricultural Marketing Act.

Economic Consideration

As noted above the costs associated with conducting the A-76 study would not be borne by the reimbursable Seafood Inspection Program and therefore would need to come from the appropriated (i.e., taxpayer) funds of NMFS/NOAA/USDC. The estimated costs for conducting such a study is placed at approximately \$2,500 per person considered for competition with the private sector. NMFS/NOAA has identified the activities of 157 USDC Seafood Inspection Program employees for the A-76 study, yielding a projected cost of approximately \$392,500. If a fundamental purpose of the FAIR Act and subsequent actions is to reduce the costs of government and thereby save the taxpayers' money, how is it to the taxpayers' benefit to have a function that costs the taxpayer nothing, be subjected to a study that will cost the taxpayer \$392,500?

In the event that the activities of the 157 positions in the Seafood Inspection Program are contracted out to the private sector, certain employees would be entitled severance pay. After removing those employees that would be eligible for immediate annuity through either (1) Optional Retirement or (2) Discontinued Service Retirement and therefore not eligible for severance pay, the estimated severance pay for eligible employees would amount to approximately \$1.8 million. According to information provided by NOAA Human Resources, severance pay would be paid out of NOAA appropriated funds. Again, for a Program that currently costs the taxpayer nothing, the taxpayer will now be obligated to pay an additional \$1.8 million. How is this action to the benefit of taxpayers?

It was previously noted that the USDC Seafood Inspection Program actually contributes approximately \$1.6 million annually to NMFS and NOAA in overhead costs that reduce these agencies' appropriated funds needs. Would the same level of support be realized if these activities are contracted to the private sector, or would the taxpayer find that additional funds were necessary to support NMFS/NOAA administrative functions?

Logistical Considerations

Participants of the USDC Seafood Inspection Program utilize the inspection and certification services because they are rendered by impartial government employees. Certification to some domestic buyers and export certification to certain foreign countries require that the inspection/certification functions be performed by governmental personnel. In the event that the activities of the Program are contracted out to the private sector, the following results could occur:

- (1) certain domestic buyers may choose to end their participation in the Program;
- (2) additional federal staff would need to be retained in order to provide inspection/certification to meet buyer requirements or foreign country requirements.

In both cases these conditions would result in increased costs to provide the inspection services. In the first case, the smaller number of participants would mean that the fixed costs (e.g., support costs, costs of office space, etc) would be spread over a smaller base resulting in higher individual costs. In the second case, the costs of the inspection services would be higher and more disruptive to industry production schedules than currently because some functions would be performed by a private contractor whereas others would need to be performed by a governmental employee (i.e., instead of inspection needs being handled by one individual it would take two).

In order to address the inspection requests received from industry in a timely and cost effective manner, the Program maintains agreements with USDA and 16 States. Under these agreements, cross-licensed USDA and State inspectors are trained by USDC to inspect/certify certain fishery products on behalf of the Federal Government. USDC reimburses USDA or State from the fees that are collected from industry for the services rendered. These cooperative activities result in better utilization of the Federal and State resources to the benefit of the industry and consumers. Such cost effective relationships would cease to exist or, at the very least, be adversely affected under private sector contract(s).

Summary

The USDC Seafood Inspection Program inspects/certifies approximately 17% of the fishery products consumed in the United States, while also providing inspection and certification of more than 142 million pounds of U.S. exports to meet the requirements of foreign governments and buyers. Sanitation and hygienic practices are evaluated, along with product inspection in approximately 240 processing plants located throughout the U.S., American Samoa, and Puerto Rico. In addition, product lot inspections are conducted for approximately 2500 firms annually. These activities are recognized by the FDA and enhance the assurances that industry and consumers are provided with safe, wholesome, properly labeled products of identified quality.

These activities are completely reimbursed through fees charged to the industry for the services rendered. No appropriated funds are provided to this Program and under such conditions the Program is excepted from consideration under the FAIR Act as a “Nonappropriated funds instrumentality”.

The discretion required to perform these duties and their significance to the industry and consumers toward the maintenance of a secure, safe, wholesome, and properly labeled food supply demonstrate that these are “inherently governmental functions”, and thereby are not subject to consideration for contracting out to the private sector.

Statutory, economic, and logistical considerations further reinforce that the USDC Seafood Inspection Program was inappropriately identified for inclusion under the FAIR Act and that no benefits would be afforded to the U.S. taxpayer.

Therefore, a Notice should be expeditiously published in the Federal Register advising that the designation of the activities of the USDC Seafood Inspection Program has been changed to reflect its inherently governmental function.

Richard V. Cano
Acting Director, Seafood Inspection Program
NMFS/NOAA
U.S. Department of Commerce

Date

Attachment A
Legal Opinion of James W. Peaco
Senior Attorney, Office of General Counsel for NOAA Fisheries



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

January 24, 2003

MEMORANDUM FOR: F/SI - Richard Cano

FROM: GCF - *James Peaco*
James Peaco

SUBJECT: Seafood Inspection Program FAIR Act Exemption

I recommend a legal opinion be requested from the Department of Commerce Office of General Counsel (DOC/GC) on: (1) whether the Seafood Inspection Program (SIP) qualifies for a statutory exemption from inclusion on the Federal Activities Inventory Reform (FAIR) Act listing; (2) the determination that SIP functions remain "inherently government" (consistent with the Department of Agriculture's (USDA) interpretation of the same statute implementing the SIP); and (3) the determination any cost associated with implementing the FAIR Act process cannot be used to increase fees imposed upon inspection program participants. I believe the SIP should not be subject to the FAIR Act process. However, DOC/GC has the authority and responsibility for the official resolution of these issues.

Under its authorizing legislation, the Department of Commerce (DOC) Seafood Inspection Program is exempt on two grounds from being listed as an activity for listing under the Federal Activities Inventory Reform Act (Public Law 105-270). First, it qualifies as a nonappropriated fund entity under section 4(b)(3) of the FAIR Act. Second, the functions performed by SIP personnel have always been considered by NOAA and DOC to be "inherently governmental" in nature long before the recent attention given to food safety and bio-terrorism.

A fundamental principle of the FAIR Act is to discourage the federal government from using appropriated or taxpayer funds to produce goods or services already commercially available. This is based upon a concept that Federal funds should not be used by agencies to engage in activities that unfairly compete with private sector businesses that can provide the same services. SIP operations are paid for by the use of nonappropriated funds received from voluntary participants. Participants voluntarily pay for SIP services because the USDC services or benefits they need or desire are **not** commercially available. SIP services are purchased because they are rendered by impartial government employees. These services are in great demand by private sector participants and governmental entities (domestic and foreign) for that reason. Even with personnel restrictions, last year the SIP generated income of about \$1.6 million for NOAA/NMFA through the imposition of administrative fees which the program paid.

Since the SIP does not rely upon the use of appropriated or taxpayer's funds, underlying FAIR Act goals such as saving money or preventing unfair competition cannot be addressed by a SIP



listing. The funding mechanism for the SIP is authorized by law and was not created by Executive agency fiat. The provisions of 7 U.S.C. 1622(h) specifically require the primary source of SIP funding be nonappropriated funds supplied by **reasonable** fees imposed upon its users. It would be unreasonable to charge SIP participants any additional increased costs associated with proposing a FAIR Act inventory listing in order to give NOAA/NMFS an illusory benefit that it is in compliance with the Act.

The Department of Commerce does not have an independent statutory authority to operate its fishery products inspection program. Reorganization Plan No. 4 of 1970 (84 Stat. 2090) transferred the operation authority under various statutes to Commerce to conduct inspection programs. The Department of Agriculture's powers under the Agricultural Marketing Act of 1946, as amended, are still used by both agencies to conduct food safety and inspection programs. Agriculture's inspection programs are funded under **both** appropriated and nonappropriated funds. However, Agriculture has not considered its inspection functions to be suitable for FAIR Act consideration. To avoid potential inconsistency in interpreting our shared statutory authority, I believe any decision to list DOC 's inspection program under the FAIR Act inventory should only be made with the prior concurrence of the Secretary of Agriculture.